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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
JON DAVID OGREY,
Defendant and Appellant.

A144632
(San Mateo County
Super. Ct. No. SC082400A)

The trial court denied Jon David Ogrey's motion to suppress and he pled no contest to unlawful possession of an assault weapon (Pen. Code, § 30605).¹ The trial court placed Ogrey on probation. Ogrey appeals. He contends the exigent circumstances doctrine did not justify the warrantless search, and the police officers could not seize the assault rifle without a warrant. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged Ogrey with unlawful possession of an assault weapon (§ 30605) and unlawful manufacture of a large capacity magazine (§ 32310). Ogrey moved to suppress, claiming law enforcement officers searched his bedroom without a warrant or exigent circumstances. The facts are taken from the hearing on the motion to suppress.

In October 2014, San Mateo Police Officer Angelica McDaniel was driving her patrol car in a commercial district when she heard an alarm. It was 9:44 p.m. and the

¹ Unless noted, all further statutory references are to the Penal Code.

businesses in the area were closed. Officer McDaniel parked in an alley and got out of the car. She noticed the roll-up garage door at an auto repair facility (garage) “was up” and “the business was completely dark.” Officer McDaniel could not tell whether there were any signs of forced entry. As Officer McDaniel called dispatch, she “saw movement” inside the garage and “an unknown male in a darkened shadow.” Dispatch told Officer McDaniel it was “receiving a burglary alarm” from the garage.

Officer McDaniel shined her flashlight into the garage and yelled, ““San Mateo Police Officer, come out with your hands up.”” The man — later identified as Ogrey — retreated into the garage. As Officer McDaniel repeated her command, Ogrey grabbed a wooden object that “almost looked like a broomstick” and “started pacing around.” Officer McDaniel pointed her weapon at Ogrey and told him to put the object down; after she repeated her command a few times, Ogrey came out of the garage with his hands on his head. Officer McDaniel “detained [Ogrey] in handcuffs.” She believed there was a burglary in progress because the businesses in the area were closed, the garage’s alarm was sounding, and Ogrey was not cooperative and did not have identification.

As Officer McDaniel was detaining Ogrey, other law enforcement officers arrived, including San Mateo Police Officer Haddad. Officer McDaniel told the officers she had not cleared the “inside of the darkened area.” Officer Haddad was familiar with the area and did not think it was a “false alarm” because “there were no lights on. Typically, when there would be a false alarm, lights would be on[.]” The garage — which was “quite large” with high ceilings — was “completely black.” Officer Haddad believed a burglary was in progress because the garage was dark, and because he knew Officer McDaniel had heard an alarm, and “the subject was uncooperative and at some point . . . had some sort of weapon.” Officer Haddad and two other police officers went into the garage “to do a protective sweep[.]” Officer Haddad believed there was an officer safety issue and wanted “to make sure there were no suspects” in the garage.²

² Officer McDaniel also believed a protective sweep was necessary because she could not see into the garage and because burglars often work in pairs and carry firearms.

Officer Haddad and the other officers went through the lower floor of the garage and saw a staircase. Officer Haddad went up the stairs and saw “some sort of room with a door[.]” Inside the room — which appeared to be a bedroom — Officer Haddad immediately saw two weapons: an assault rifle on one side of the bed and another gun with “the hammer cock[ed] back” on the other side. Behind the bed were curtains and large boxes “where somebody could have easily been hiding.” As the officers searched the garage, they did not hear noise or see a second person.

While the officers were conducting the sweep, Ogrey told Officer McDaniel the owner of the garage allowed him to be on the premises. Ogrey, however, did not present keys to the building. Officer McDaniel called the business owner and confirmed Ogrey was allowed to be in the garage. Ogrey then told Officer McDaniel he lived in the garage and had forgotten the alarm code. Eventually, the garage’s alarm stopped.

At the conclusion of the motion to suppress hearing, the prosecution argued the burglary created exigent circumstances allowing the officers to search the garage. The court agreed and denied the motion to suppress. It concluded the officers had “reasonable cause to believe that a burglary may be in progress and reasonable cause to believe that an individual other than the defendant was in [the garage], and would then give them justification to search the premises[.]” The court also determined the assault rifle was in plain view.

Ogrey pled no contest to unlawful possession of an assault weapon (§ 30605) and the court placed him on probation with various terms and conditions.

DISCUSSION

I.

Exigent Circumstances

“The Fourth Amendment to the federal Constitution guarantees against unreasonable searches and seizures by law enforcement and other government officials. Because a warrantless entry into a home to conduct a search and seizure is presumptively unreasonable under the Fourth Amendment [citation] the government bears the burden of establishing that exigent circumstances or another exception to the warrant requirement

justified the entry. [Citation.]” (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. omitted (*Rogers*).)

“[T]he exigent circumstances doctrine constitutes an exception to the warrant requirement when an emergency situation requires swift action to prevent imminent danger to life. [Citation.] ““The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.” [Citation.] And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. [Citations.]’ [Citation.] In this regard, ““[t]here is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.”” [Citation.] Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of the entry would cause a person of reasonable caution to believe that the action taken was appropriate. [Citation.] On appeal, we uphold the trial court’s factual findings if they are supported by substantial evidence, but independently review its determination that the search did not violate the Fourth Amendment. [Citation.]” (*Rogers, supra*, 46 Cal.4th at pp. 1156-1157.)

“[T]o fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause and the existence of exigent circumstances. [Citation.] . . . ‘Probable cause exists when the facts known to the arresting officer would persuade someone of “reasonable caution” that the person to be arrested has committed a crime. [Citation.] “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts” [Citation.] It is incapable of precise definition. [Citation.] ““The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,”” and that belief must be “particularized with respect to the person to be . . . seized.”” [Citation.] . . . [¶] The standard to be applied is an objective one: ‘An action is “reasonable” under the Fourth Amendment, regardless of the individual officer’s state of mind, “as long as the circumstances, viewed objectively, justify [the] action.”’ [Citation.]” (*People v. Lujano* (2014) 229 Cal.App.4th 175, 183 (*Lujano*).)

II.

Exigent Circumstances Justified the Search of the Garage

Ogrey claims there were no exigent circumstances. We disagree. “A burglary in progress may constitute an ‘exigent circumstance,’ as that phrase is used in Fourth Amendment jurisprudence.” (*Lujano, supra*, 229 Cal.App.4th at p. 183; *People v. Ray* (1999) 21 Cal.4th 464, 482 [“[e]xigent circumstances existed, because the officers had reasonable cause to believe a burglary was in progress, or that a burglary had been committed and there might be persons inside the residence in need of assistance”], concurring opn. of George, C.J.; *United States v. Tibolt* (1st Cir. 1995) 72 F.3d 965, 970 [warrantless search justified by exigent circumstances; facts “unquestionably” supported conclusion the police officer “had probable cause to believe a breaking and entering had been or was being committed”].)

People v. Duncan (1986) 42 Cal.3d 91 (*Duncan*) is instructive. In that case, a police officer responded to a “call that a burglary was in progress or had just occurred[,]” at a residence and spoke to a neighbor, who apparently told the officer he saw two teenagers leaving the house with a television set. (*Id.* at p. 95.) The police officer noticed a back window was open and a television set and other items were beneath the window. (*Ibid.*) “Surmising that one or more of the burglars was still inside,” the officer climbed in the window “to search for intruders” and saw a drug laboratory. (*Id.* at p. 96.) The trial court denied the defendants’ motion to suppress and the California Supreme Court affirmed, concluding the police officer’s “warrantless entry into defendants’ residence was justified by the exigent circumstance of a burglary in progress.” (*Id.* at p. 98.) The *Duncan* court concluded substantial evidence supported the trial court’s finding that the police officer reasonably believed at least one burglar was inside the house and observed it “would have been poor police work indeed for an officer to fail to investigate under circumstances suggesting a crime in progress.” (*Id.* at pp. 98-99.)

The same is true here: exigent circumstances justified Officer Haddad’s entry into the garage. Like the officer in *Duncan*, Officer Haddad responded to a call of a burglary in progress and observed circumstances suggesting a burglary: a sounding alarm, a

darkened business, an open door, and a suspect who had been uncooperative, who had no identification, and who had held “some sort of weapon.” Officer Haddad entered the garage to look for “other subjects” and to protect the officers outside the garage. Under the circumstances, it would have been “poor police work” for Officer Haddad to fail to investigate.³ (*Duncan, supra*, 42 Cal.3d at p. 98.)

Ogrey’s reliance on *Lujano* does not alter our conclusion. In that case, police officers detained a man “in the driveway in front of a house, whom they observed stripping copper wire from an air conditioner[.]” (*Lujano, supra*, 229 Cal.App.4th at p. 179.) They also detained the occupant of the house — the defendant — suspecting “‘maybe possibly’ a burglary was in progress. The officers were aware of no facts particular to the occupant of the house suggesting that he was a burglar, rather than a resident. And they made no reasonable attempt to ascertain such facts until after he was detained. It was later determined he was in fact a resident.” (*Ibid.*)

The *Lujano* court noted a “burglary in progress may constitute an ‘exigent circumstance’” but determined the police officers did not have probable cause to believe the defendant was engaged in a burglary, or any other crime. (*Lujano, supra*, 229 Cal.App.4th at p. 183.) As the court explained, “Officer Galbreath never observed defendant doing anything suspicious, say, rifling through drawers. There is no evidence defendant acted aggressively or menacingly toward Officer Galbreath, or tried to flee. Rather, defendant made his presence known when commanded to do so, and obeyed all police instructions after that point. . . . [¶] A partially open door by itself is not probable cause justifying a warrantless search or seizure in a residence, and nothing in our record suggests Officer Galbreath was aware of any additional facts tending to suggest either a

³ This is not — as Ogrey argues — a situation like the one in *U.S. v. Struckman* (9th Cir. 2010) 603 F.3d 731, where the Ninth Circuit Court of Appeals held law enforcement officers did not have probable cause to believe the defendant was engaged in burglary or attempted burglary because “there were no indications [the defendant] had entered or attempted to enter the home, . . . no signs of forced entry or the presence of any tools consistent with a possible burglary.” (*Id.* at p. 740.) Here, Ogrey was inside the garage, in the dark, with a wooden broomstick.

burglary in progress, or the presence of the victim of a burglary in need of emergency care.” (*Id.* at pp. 185-186.) *Lujano* concluded the “defendant’s warrantless detention inside his residence lacked probable cause, and therefore violated the Fourth Amendment.” (*Id.* at p. 187.)

Lujano is distinguishable. As discussed above, the police officers here possessed specific and particularized facts suggesting a burglary was in progress in the garage: businesses in the area were closed, the garage’s burglar alarm was sounding, and the garage door was up but the garage was completely dark. Officers McDaniel and Haddad believed a burglary was in progress and testified burglars often work in pairs and carry firearms. Unlike the defendant in *Lujano*, Ogrey acted suspiciously and menacingly: he paced “in darkened shadow” with a wooden broomstick in his hands, repeatedly ignored Officer McDaniel’s commands, and did not have identification. *Lujano* does not assist Ogrey.

Ogrey contends Officer Haddad’s conclusion there was a burglary in progress and that someone was inside the garage was unreasonable and did not constitute probable cause. According to Ogrey, burglar alarms often produce “false alarms” and there were no indications of “illicit entry, such as an open back window[.]” We are not persuaded for several reasons. First, we must consider “the totality of the circumstances,” and “the fact that certain circumstances were not present here, such as [an open back window], does not defeat the finding of an emergency.” (*Rogers, supra*, 46 Cal.4th at p. 1160.) Second, and as we have discussed there *were* numerous signs of illicit entry here. Third, Officer Haddad testified he was familiar with the area and did not think it was a ““false alarm”” and Officer McDaniel testified burglars often work together and carry firearms. The officers’ testimony supports the court’s implicit finding that exigent circumstances justified Officer Haddad’s entry. We must defer to the trial court’s implicit factual findings. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

Ogrey also claims the police officers’ failure to question him before entering the garage was not reasonable, and suggests there was no emergency because Officer McDaniel had already detained him when Officer Haddad entered the garage. We

disagree. The question is not whether the officers did everything they possibly could have done short of entering the garage, but whether Officer Haddad's conduct was reasonable. The answer is yes: it was reasonable for Officer Haddad to enter the garage to “““preserve life or avoid serious injury[.]””” (Rogers, *supra*, 46 Cal.4th at p. 1156; *People v. Dyke* (1990) 224 Cal.App.3d 648, 660.)

We conclude Officer Haddad lawfully entered the garage pursuant to the exigent circumstances doctrine. He did not need a warrant to seize the assault rifle, which was in plain view. “““The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.” [Citation.] And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. [Citations.]’ [Citation.]” (Rogers, *supra*, 46 Cal.4th at p. 1156.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

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